No. 82-2140

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILBUR HOBBY,

Petitioner,

—vs.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA, *AMICI CURIAE*

IN SUPPORT OF REVERSAL

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated to preserving and defending the rights guaranteed by the Constitution. The ACLU of North Carolina is one of its state affiliates.

This is the first case that we can recall, in half a century, in which the United States has defended before this Court and sought to preclude a remedy for the government's reservation of a position exclusively for white males. As such, and involving as it does the solemn institution of the grand jury which lies at the heart of the criminal justice system, this case presents an extremely important issue requiring the most careful scrutiny and analysis. We file this brief amici curiae, with the consent of both parties, to assist the Court in that undertaking, and to provide it with an approach

which has to our knowledge escaped the attention of the lower courts which have heretofore considered this issue.

STATEMENT OF THE CASE

Wilbur Hobby, President of the (interracial) North Carolina AFL-CIO, was indicted for federal fraud, namely, misappropriating funds secured by contract under a federal program for the training of unemployed and unskilled young persons in North Carolina. Prior to trial, by appropriate motion, he moved to dismiss the indictment on the basis that it was constitutionally defective and that he thus could not "be held to answer" according to the Fifth Amendment. More particularly, he alleged that the position of foreman of the grand jury which had presumed to indict him had been reserved for white males only, pursuant to an apparent pattern or practice characteristic of the federal

judicial district in which the indictment was returned.

In the ensuing hearing on his claim, his counsel, pursuant to burden-of-proof guidelines laid down by this Court (see Castaneda v. Partida, 430 U.S. 482 (1977) and Peters v. Kiff, 407 U.S. 593 (1972)), established what he regarded to be a sufficient prima facie case of such purposive racial discrimination. The evidence consisted principally of data showing that during a relevant six year period (1974-81), of fifteen federal grand juries held in that district, all had white male foremen although 30 percent of the resident population was nonwhite and, indeed, 20 percent of the grand jury panels were nonwhite; that the "chance" probability of such a racially-suggestive selection practice without race having entered into the selection was exceedingly remote; and that the procedure pursuant to which the foreman was

designated was wholly personal and subjective. The defendant urged that this evidence would at a minimum shift to the government the burden of producing evidence providing plausible explanation for the results other than substantial involvement of race. In response, the government offered no evidence (cf. the government's case in Rose v. Mitchell, 443 U.S. 549 (1979); compare it also with the government's case in United States v. Perez-Hernandez, 672 F. 2d 1380 (11th Cir. 1982); see also United States v. Daly, 573 F. Supp. 788, 795 (N.D. Texas 1983) ("Clearly, Judge Mahon's testimony, which the parties stipulated to be representative of the District practices ... rebutted any inference of purposeful discrimination."))

In denying Mr. Hobby's motion, the federal district judge held as a matter of law that "the addition of this element (App. Rec. at 214) makes [no] difference in the plan

that has been entered into by this district," i.e., that a federal grand jury otherwise satisfying the Fifth Amendment and pertinent Acts of Congress necessarily satisfies the Fifth Amendment even if the position of foreman is reserved in fact for white males only. On appeal, a three-judge panel for the Fourth Circuit agreed. The treatment of the issue is not left in doubt, as the following excerpt makes quite clear:

> [T]he rights of defendants are adequately protected by assurance that the composition of the grand jury as a whole cannot be the product of discriminatory selection. (emphasis added)

Thus, that there may indeed have been purposive and systematic reservation for the position of foreman for white males only is to be treated as no abridgment of the following express, opening clause of the Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.

Noting that this position is squarely opposed to the contrary conclusion of the Eleventh Circuit (United States v. Perez-Hernandez, 672 F. 2d 1380 (11th Cir. 1982))[1], this Court granted certiorari limited to the question thus presented.

QUESTION PRESENTED

The question presented has not previously been decided by this Court, although one might have thought it was because the answer was obvious rather than because it could be regarded as difficult or doubtful. The question is this:

> Is a twenty-three member committee convoked to determine who shall be tried for a federal crime a "Grand Jury" within the

[1] See also United States v. Cross, 708 F. 2d 631 (11th Cir. 1983) (opinion by Judge Frank Johnson, categorically rejecting the government's argument that "the office of federal grand jury foreperson is constitutionally insignificant," in an opinion the Fourth Circuit did not have available at the time of its own decision in this case.) Portions of Judge Johnson's opinion in Cross are set forth in an appendix infra.

meaning of the Fifth Amendment when the position of foreman has been reserved for white males only?

To be sure, the question might be phrased in a slightly different way, but we think the starkness of the issue would remain utterly unaffected. To put the best face on the question (from the government's point of view), without obscuring the issue altogether, the question might be stated in the following alternative fashion:

> Assuming no sufficient exclusion of non-white persons as might affect the constitutional composition of the Grand Jury as a whole, does the Fifth Amendment then permit a valid indictment by that jury when its foreman position has been reserved by the superintending Article III judge for white males only?

SUMMARY OF ARGUMENT

Respectfully, we believe the answer to the question is obvious and that, indeed, it will not divide this Court. Accordingly, we shall argue that when a federal criminal defendant makes a direct, timely, pretrial objection (cf. David v. United States, 411

U.S. 233 (1973)) accompanied by clearly sufficient evidence to require the government to put on at least some kind of evidence that might dissipate the inference of deliberate racial designation of the grand jury foreman and the government simply demurs, the presiding judge is obliged to dismiss the indictment and the government is obliged to begin again, i.e., to present its case to a "Grand Jury" consistent with the Fifth Amendment. We shall also argue that in no event could the error be extinguished by overruling the objection and then arguing subsequently that the outcome of the ensuing, improperly-held trial either moots or renders harmless the wrong thus done the accused. Unless, then, the accused neglects his own right of appeal or makes some other procedural default thought sufficient to cut him off (which no one claims to have occured here), the duty of the Court of Appeals is perfectly plain. It

is to reverse the conviction with direction to dismiss the indictment, with or without prejudice to the right of the goverment to begin a new proceeding -- but in any event with due regard to the rights of the accused as guaranteed by the first clause of the Fifth Amendment. Correspondingly, the failure of the Court below to follow that course in this case was itself reversible error which petitioner has asked to be corrected, on direct review and in timely fashion, by the judgment of this Court. We see no reason for it to be denied.

ARGUMENT

I

We believe that no disagreement between the Eleventh and Fourth Circuit Courts of Appeals would have arisen respecting the issue in this case, but for a misunderstanding of the pertinent case law. The divergence of views arises, we think, from an

understandable confusion resulting from dicta in a decision by this Court in a case not involving the Fifth Amendment Grand Jury clause at all. The case, Rose v. Mitchell, 443 U.S. 549 (1979), arose under the Fourteenth Amendment which contains no grand jury clause or guarantee.[2]

In Rose v. Mitchell, this Court noted the distinction between state and federal proceedings, but then went forward appropriately to observe that even in state criminal proceedings, purposive racial manipulation in the state's own selected mechanisms for bringing accused persons to trial might raise substantial questions under the due process

[2] Indeed, the Fourteenth Amendment provides no constitutional right that "No person shall be held" for felony trial for a state offense "unless on a presentment or indictment of a Grand Jury." Hurtado v. California, 110 U.S. 516 (1884). Rather, the states are constitutionally at liberty to proceed by a diversity of pretrial mechanisms, such as a preliminary hearing rather than an indictment, so long as the mechanism denies neither due process nor equal protection to the accused.

or equal protection clauses. Although Rose v. Mitchell held only that no sufficient prima facie case of purposive discrimination had been established, a majority of the Court suggested that in a future case racial discrimination in the selection of the foreman of the state Grand Jury might vitiate the subsequent conviction of the defendant.[3]

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[3] Specifically, the Court "assumed without deciding that discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside, just as if the discrimination proved had tainted the selection of the entire Grand Jury venire." 443 U.S. at 55 n. 4. (emphasis added). Two Justices dissented from that suggestion (Justices Stewart and Rehnquist), reasoning from Mr. Justice Jackson's dissent in Cassell v. Texas, 339 U.S. 282, 298 (1950) that since states were not constrained by the Fifth Amendment's Grand Jury clause, "any possible prejudice" to the accused that might have resulted from the participation of the improperly selected Grand Jury foreman "disappears when a constitutionally valid trial jury later finds him guilty beyond a reasonable doubt." (443 U.S. at 575). A third Justice (Justice Powell) wrote separately to record his view that, in any event, the objection of the conviction could not be resurrected by way of collateral attack, in a federal habeas proceeding, after having lost on the merits following "a full and fair opportunity to litigate in the state courts the claim of discrimination." (443 U.S. at 579). Two Justices (White and Stevens) dissented from the outcome, on the other hand, believing that the prima [cont'd. on next pg]

This case is not a reprise on Rose v. Mitchell, as the Fourth Circuit (and even the Eleventh Circuit) assumed. It does not invite a gratuitous review of strong differences (e.g., differences of federalism, differences of incorporation, differences of equal protection, of due process or of harmless error) that trouble this Court in adapting the Fourteenth Amendment to the uses of state grand juries. Unfortunately, both the Fourth and Eleventh Circuits, while nominally understanding that Hobby and Perez were federal cases arising under the Fifth (rather than the Fourteenth) Amendment, nonetheless treated the issue substantially by borrowing "due process" and "equal protection" analyses. Each thus, in our view, mistakenly treated the issue in a manner that we think gratuitously invites confusion with state

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facie case was in fact sufficient and unrebutted, and that the conviction should thus have been reversed.

proceedings which are not necessarily affected by a correct decision here. Correspondingly, each seriously understated the stricter requirements which this Court has always found in Fifth Amendment's explicit grand jury clause.

The necessity for isolating the more specific requirements of the Fifth Amendment grand jury clause was recognized by this Court most recently in Castaneda v. Partida, 430 U.S. 482 (1977), which voided a state criminal conviction on the basis of what this Court held to be an unrebutted prima facie showing of purposeful racial culling in the composition of a state grand jury as a whole. Castaneda was decided solely under the due process and equal protection clauses of the Fourteenth Amendment. No question was raised (nor could it have been raised) pursuant to the grand jury clause of the Fifth Amendment. That distinction, moreover, was

felt to be critical for the four members of this Court who dissented in Castaneda. Indeed, in explaining why they were unable to concur in the opinion for the Court, the dissent in Castaneda may very well imply that here, in this case, there is no reason at all to expect any division in this Court respecting the proper outcome. For in the course of his dissent for four members of this Court[4], Justice Powell took care to note the differences, and not merely the similarities, between Fifth Amendment Grand Jury objections and the less demanding nature of the Fourteenth Amendment due process or equal protection clauses. (430 U.S. 509-510, 516). His observations are highly pertinent in this case. Indeed, we think they are

[4] Justice Powell dissented on the ground that given the exceptional demographic and political circumstances of the Texas county in which the Grand Jury was selected, no sufficient prima facie case of purposive discrimination had been made.

controlling.

Specifically, Justice Powell provided an example according to which Fifth Amendment grand jury claims are separate from, independent of, and more precise than claims that state defendants may assert pursuant only to the more generalized "due process" or "equal protection" provisions of the Fourteenth Amendment or, for that matter, that federal criminal defendants might possess if protected only by the due process clause of the Fifth Amendment. Thus he noted:

> The right to a "representative" grand jury is a federal right that derives not from the requirement of equal protection but from the Fifth Amendment's explicit requirement of a grand jury. The right is similar to the right -- applicable to state proceedings -- to a representative petit jury under the Sixth Amendment. See Taylor v. Louisiana, 419 U.S. 522 (1975).

The point was significant for the dissent in Castaneda because the separate affirmative requirement of a "representative" grand jury, as distinct from one merely not intentionally

culled of persons of the same race as the accused, afforded a federal criminal defendant a specific guarantee not captured in the less precise demands of the Fourteenth Amendment (or the less precise demands of the Fifth Amendment's own due process clause).

In a federal case, proof of insufficient demographic cross-sectional representativeness in the federal grand jury's composition would per se establish a prima facie case, sufficient to shift to the government the burden of justification; additional proof of probable purposiveness is not required (cf. Duran v. Missouri, 439 U.S. 357, 386 n. 26 (1979)). Additionally, given the unequivocable provision on the face of the Fifth Amendment's grand jury clause ("No person shall be held ... unless ..."), it is totally unnecessary in a Fifth Amendment case that the person who objects to an improperly constituted grand jury also be of the same race

or class unwarrantedly excluded from (or under-represented in) that jury. (See Duran v. Missouri, supra, and Taylor v. Louisiana, supra; cf. United States v. Cronn, 717 F. 2d 164 (5th Cir. 1983)).[5]

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[5] In principle, an accused should be able to insure that he not be wrongly "held to answer" when not indicted by a properly composed federal grand jury by immediate appeal from the erroneous denial of his timely, pretrial motion to dismiss. Since, however, overriding policies of judicial administration clearly discourage (and may forbid) such an interlocutory appeal (see, e.g., 28 U.S.C. § 1291, United States v. MacDonald, 435 U.S. 850 (1978)), necessarily the error must be corrected on subsequent direct review, without prejudice resulting from the fact of conviction at trial. Again, the situation is in contrast, rather than likeness, to state criminal proceedings insofar as there is no Fourteenth Amendment incorporation of the grand jury clause and the sole protections are of due process and equal protection alone.

Even if a majority of this Court had accepted Justice Jackson's position from Cassell v. Texas, (but see Rose v. Mitchell, 443 U.S. at 575), it could not apply Justice Jackson's argument to this case which involves not merely due process but also the specific command of the grand jury clause. The government may not first forbid an accused to seek timely correction of constitutional error by denying him an interlocutory appeal prior to trial (which trial by hypothesis the grand jury clause forbade to proceed on the basis of a constitutionally defective indictment), and then forbid him to have that error corrected even after trial (which, again, ought not have been held) on direct appeal. The Fourth Circuit itself suggested no such possibility. Either an immediate and [cont'd. on next pg]

The implication is thus unmistakable that no member of this Court would disagree that a well-taken objection to an indictment returned by an improperly constituted federal grand jury would require the government to begin again, i.e., to turn the square corners of the grand jury clause by seeking reindictment by a grand jury within the compositional requirements of the clause. The question in this case, then, is solely whether the deliberate reservation of the foreman position for white males only is within the compositional requirements of the Fifth Amendment's explicit grand jury clause.

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interlocutory appeal must be allowed in all cases in which a timely motion to dismiss the allegedly defective indictment is denied (and counsel correspondingly held to have "waived" the objection by failing at once to appeal) — a position this Court has not encouraged — or, as here, the original objection remains fully alive on direct review. Any other result would annhilate the grand jury clause by "Catch 22," i.e., that no one may appeal when it is timely, and no one subsequently convicted may appeal at all.

We submit that the answer to that question, although previously undecided for lack of occasion to state the obvious, is simple. The grand jury clause is one in which this Court has repeatedly emphasized that "the medium is the message." Strict compliance with its compositional integrity is extremely important, because its substantive integrity cannot ordinarily be subjected to extended discovery or review. As emphasized by this Court (see, e.g., Costello v. United States, 350 U.S. 359 (1956)),[6] the internal confidentiality of federal grand jury proceedings ought generally to remain closed to discovery or to subsequent review. The principal protection of persons suspected of serious federal offenses under the grand jury clause is in the constitutional assurance of

[6] And as emphasized also in the last third of Judge Johnson's recent opinion in United States v. Cross, 708 F. 2d 631, 633 (11th Cir. 1983), reproduced as Appendix A infra.

its fair composition without, however, throwing open its private deliberations to litigous discovery. An immense history, as well as strong considerations of public policy, counsel against the ahistorical extension of "due process" discovery into the sealed transcript or confidential proceedings of the federal grand jury. Precisely because that is so, however, it is correspondingly crucial that formal compositional standards of that jury be strictly adhered to. The fact and appearance of fairness in the composition of that jury thus checks, albeit imperfectly, what one might otherwise insist upon trying to determine by ad hoc foraging into its internal operations, e.g., how much evidence did it have, what kind of evidence did it receive, what degree of examination was made of its witnesses, what degree of influence did the United States Attorney appear to exert, what predispositions may have affected

its members, etc.

Adherence to formal integrity in the composition of a federal grand jury is the minimum to which an accused is entitled by the federal grand jury clause. The alternative, to be less concerned with invidious staffing practices in forming that jury, leaves no means available to secure the integrity of the grand jury clause other than by permitting a review of the jury's internal operation in each case: to determine the prejudice vel non of its actual conduct. But this latter approach is precisely, and wisely, what this Court has admonished is inappropriate. See United States v.Costello, supra. Accordingly, as the post of foreman necessarily designates the person so appointed as primus inter pares, the required standard is obvious: no invidious racial choice may affect that designation. The rule itself is simple and its application is straightfor-

ward. Any other rule would be puzzling to account for, ad hoc in its application, and indeed implausible even for the government to "explain." We can imagine no interest (indeed the government suggests none) in permitting the post to be reserved to white males only.

II

In this case, the Fourth Circuit concluded, without remanding for determination of what particular role the particular grand jury foreman actually played, that "the impact of the federal grand jury foreman ... is too vague and uncertain to warrant dismissal of indictment" even assuming the post was reserved for white males. (A-17, -18). We believe this constituted reversible error. We believe it was reversible error, however, not because the Fourth Circuit treated the issue as one of law rather than of "mixed" fact and law (i.e., what role this foreman

may or may not have had in this case), but because it erred although properly treating the question as one of law. Given United States v. Costello and similar cases, we agree that it is undesirable to have defense counsel forage within the trascript of federal grand jury proceedings in order to determine whether or to what extent a particular grand jury foreman was more--or--less influential than other jury members, or whether, if he were especially influential, how his race or racial perspective affected how he behaved or how he influenced others. No such inquiry or odious speculation is appropriate. Rather, the historic fact is that the foreman position is not just some supernumerary position honorifically invented in the twentieth century,[7] and it retains its

[7] Indeed, it is virtually as old as the grand jury itself and has frequently been critical to the protection of an accused. See Schwartz, Demythologizing the Historic Role of the Grand Jury, 10 Amer. Crim. L. Rev. 701 (1972).
[cont'd. on next pg]

identity as primus inter pares today. Thus, as a matter of law, in no case may it be reserved for white males only.

Appended to this brief is a lengthy excerpt from Judge Frank Johnson's particularized review in United States v. Cross, 708 F. 2d 631 (11th Cir. 1983), which is far more detailed than either the Fourth Circuit's abbreviated "review" in this case or, for that matter, the Eleventh Circuit's equally brief (although contrary) review in Perez-Hernandez. We believe that Judge Johnson's review is quite sufficient. Additionally, however the Handbook for Federal Grand Jurors, provided for the instruction for our federal grand juries, itself identifies the special character of the federal grand jury foreman. In less than fourteen pages of printed material (exclusive of glossary), "the foreman" is referred to -- and his or

her primus inter pares roles described -- at least ten times over:

1. The foreman is identified as "presiding officer," and as "officer" of the grand jury. (p. 7)

2. It is the foreman whom another grand juror "must promptly advise" should some emergency prevent the other's attendance. (p. 8)

3. It is by the foreman that "each witness" shall "be sworn" when the witness first appear. (p. 9)

4. It is "the court" itself that does "appoint" him or her. (p. 7)

5. It is the foreman who first puts questions to each witness following at once after the United States Attorney. (p. 9) The foreman's priority in this regard is twice noted. (p. 13, as well as p. 9)

6. It is the foreman who determines whether the grand jury requires the assistance of an interpreter. (p. 10)

7. It is the foreman who orchestrates the grand jury when all others will have departed, i.e., it is "the foreman" who "will ask the grand jury to discuss and vote." (p. 11)

8. Quite naturally, it is the foreman, once again, who "must keep a record of the number of jurors concurring in the finding of every indict-

ment." (p. 11)

9. And thus it is the foreman, again, who will "file" that record "with the Clerk of the Court." (p. 11)

10. And, at the end, it is the foreman who "must immediately report in writing to the court" any decision not to indict the accused (p. 11), a responsibility which historically exposed the foreman to confrontration with an angry or indignant judge. (See Schwartz, supra)

Respectfully, the foreman position which historically was one of leadership remains so, by government description, today. It is rife with special connection with the presiding judge and with the United States Attorney. It is the natural center of grand jury gravity when the jury finally meets by itself. It is formalized and designated officially. It can scarcely be dismissed now, after eight centuries of primus inter pares acknowledgement, as though it were but "Queen of the May." And, respectfully, we cannot imagine that this Supreme Court would conceivably conclude that it should, a century

after the slave clauses of our Constitution were expunged, with interpretation of the Fifth Amendment already fully adjusted in keeping with that development, now condone the reservation of that position for white males only, against the objection of any accused.

CONCLUSION

In summary, we again note that this case does not provide any occasion for this Court to resolve the questions that divided this Court in Rose v. Mitchell, nor does it require this Court to determine whether the post of federal grand jury foreman is distinguishable from what was involved in that case. Rather, it requires only that the Court hold that when a federally indicted person establishes a prima facie case of effective racial designation of the post of foreman for the federal grand jury which indicted him, he may not then be "held to

answer" in the absence of evidence sufficient to dissipate the inference that the federal grand jury was indeed composed in a manner which the first clause of the Fifth Amendment does not permit. When the accused's objection is raised directly at the earliest opportunity, prior to trial itself, moreover, neither can its erroneous denial be merged in the outcome of the ensuing trial which itself ought not to have been held. Rather, insofar as an immediate, interlocutory appeal from the prejudicial denial of the motion to dismiss the indictment is clearly discouraged (and may even be wholly forbidden) by existing federal rules and policies, the objection remains unprejudiced when renewed on direct appeal following trial. When renewed on direct appeal, it must be respected with the consequence of reversing the conviction, subject only to the right of the government to retry the accused if again indicted by a

federal grand jury that does meet the compositional requiements of the Fifth Amendment grand jury clause. Because the decision by the Fourth Circuit panel did not follow this course in this case, it must be reversed and remanded for further proceedings consistent with these requirements.

Respectfully submitted,

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Appendix A
Excerpts from United States v. Cross,
708 F. 2d 631 (11th Cir. 1983)

Even if we were not bound by Eleventh Circuit precedent, we would not adopt the government's contention that the position of federal grand jury foreperson is too insignificant to form a basis for challenging an indictment. Three reasons support this conclusion.

First, the responsibilities and duties of the foreperson in the federal system cannot, in our view, be dissmissed as merely ministerial.[8] For example, the foreperson decides when to contact the district judge, and the foreperson consults with the judge outside the presence of the grand jury.[9]

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[8] The district court, in reaching a contrary conclusion on this issue, held no evidentiary hearings to determine the foreperson's responsibilities. In light of prior precedent and the analysis infra, we decide this issue as a matter of law.

[9] The record in this appeal includes correspondence between a grand jury foreperson and District Judge Owes which reflects a substantial role on the part of the foreperson in the selection of a deputy foreperson and in determining the grand jury's schedule.

Communications between the United States Attorney's office and the grand jury are through the foreperson. The foreperson decides when to convene and recess the grand jury. The foreperson, acting alone, may excuse grand jurors on a temporary basis. The foreperson may decide the order in which witesses are called. The foreperson maintains order in the grand jury. The foreperson helps the United States Attorney decide whether to initiate contempt proceedings against recalcitrant witnesses. And according to an offer of proof made by Cross in the trial court, Assistant United States Attorneys were even prepared to testify that on occasion they had sought grand jury subpoena approval from the foreperson acting alone without the consent of the entire grand jury. These duties and responsibilities, and numerous others, considered in isolation, may

under certain circumstances seem "ministerial." However, thhe overall extent and nature of the foreperson's responsibility for the very functioning of the grand jury should not permit the conclusion that the position is constitutionally insignificant.

This reasoning is reinforced by testimony of federal district judges in cases in the Northern District of Florida and the Southern District of Florida as to their selection procedures for grand jury forepersons. See United States v. Holman, 510 F. Supp. at 665-66. Almost uniformly, the district judges selected as forepersons those who had good management skills, strong occupational experience, the ability to preside, good educational background, and personal leadership qualities. One judge even testified that the foreperson should be someone who could not "be easily led by the United States Attorney." United States v. Holman,

510 F. Supp. at 1180.[10] If the duties of the foreperson were purely ministerial, a person with clerical experience would suffice. The fact that district judges look for far more than that suggests that the position is not insignificant.

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[10] For example, Appellant Cross made an offer of proof to the trial court of testimony of United States Attorneys that would show that "[o]n several occasions, the grand jury foreman was critical of the manner in which the United States Attorney's office conducted investigations before the grand jury, and thhe United States Attorney's office was responsive to those criticisms."

The nature of the relationship between the grand jury foreperson and the United States Attorney could have a significant effect on the deliberations of the grand jury. For example, in the recent case of Bryant v. Wainwright, 686 F. 2d 1373 (11th Cir. 1982) cert. denied, ___ U.S. ___, 103 S. Ct. 2096, 75 L. Ed. 2d ___ (1983), Mattie Lee Bryant was indicted by a Florida state grand jury for first degree murder of her husband. The grand jury foreperson was a white male, and one of the issues presented to this court was discrimination in the selection of forepersons. According to the state trial court, the shooting of her husband, allegedly in self-defense against his beatings, was "probably second degree [murder] or manslaughter at most." See Appellant's Brief at 31, Bryant v. Wainwright, No. 81-5483. In cases such as Mattie Lee Bryant's, which present sensitive sexual or racial issues, the composition of the grand jury and the sex and race of its foreperson conceivably could be of critical importance.

Second, even if leadership qualities and administrative ability were not considered in the selection process, the fact of a person's selection as grand jury foreperson may render the position significant. A foreperson has only one vote on the grand jury, but the selection by the district judge might appear to other grand jurors as a sign of judicial favor which could endow the foreperson with enhanced persuasive influence over his or her peers.[11]

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[11] This analysis is limited to Fifth Amendment claims. As several courts have noted, claims of underrepresentation in grand jury foreperson selections presented under the Sixth Amendment raise entirely different considerations. See, e.g., United States v. Musto, 540 F. Supp. 346, 361-62 (D.N.J. 1982) (federal grand jury foreperson's powers insufficient for purposes of Sixth Amendment claims; merits of Fifth Amendment claim not addressed); United States v. Breland, 522 F. Supp. 468, 474-77 (N.D.Ga. 1981) (federal grand jury foreperson does not possess sufficient influence over grand jury to permit Sixth Amendment challenge to foreperson selections; Fifth Amendment claim, however, may be presented). In part because of the analytical differences between Sixth Amendment claims and Fifth Amendment claims, we held in United States v. Perez-Hernandez, 672 F. 2d at 1384-85, that federal grand jury foreperson selections may not be challenged under the Sixth Amendment.

Third, regardless of the importance of the office of grand jury foreperson, we would not be inclined to refuse to inquire into a federal judge's selection process. To do so would leave us in the indefensible position of scrutinizing pursuant to Rose v. Mitchell, state grand jury foreperson selections for discrimination, while we would look the other way when similar callenges are raised against federal selections. We do not presume to guess at this point whether the federal judges of the Middle District of Georgia have in fact discriminated; we cannot, however, refuse to even permit an inquiry into their selection process. As the Court in Rose indicated, discrimination in the selection process "is especially pernicious in the administration of justice," 443 U.S. at 555, 99 S. Ct. at 2999, and "strikes at the funda-

mental values of our judicial sysem," id at 556, 99 S. Ct. at 3000. For this reason, the Court concluded that, regardless of whether a defendant could prove actual prejudice from such discrimination, "permitting challenges to unconstitutional ... action by [those who make grand jury selections] has been, and is, the main avenue by which [constitutional] rights are vindicated in this context." Id. at 558, 99 S. Ct. at 3001.[12] The same should be true in the federal system. See United States v. Cabrera-Sarmiento, 533 F. Supp. 799, 802 (S.D. Fla. 1982).

The government seeks to distinguish Rose from the instant case on the ground that the Tennessee grand jury foreperson performs significant functions which the federal fore-

[12] In approving the remedy of motions to dismiss indictments, the Court rejected alternative remedies, such as injunctions and other civil actions, as impractical and "expensive to maintain and lengthy." 443 U.S. at 558, 99 S. Ct. 3001.

person does not. In light of our earlier discussion of the federal position, we find few significant differences, and these differences are insufficient for a conclusion that the federal position is constitutionally insignificant. One difference is that the responsibilities of the federal foreperson have been developed by custom, practice, and necessity. Unlike the situation in Tennessee, no federal statute describes the role in detail. In terms of practical effect, however, we fail to see any difference as to whether the position is described by statute or by less formal means. And we do not understand the government to be arguing that, if the foreperson undertakes the duties we described above, he or she is acting ultra vires. The Tennessee foreperson also apparently serves more than one grand jury and assists the district attorney in investigating crime. See Mitchell v. Rose, 570 F. 2d

129, 136 (6th Cir. 1978). But for constitutional purposes, the foreperson's role as leader of any given grand jury should far outweigh his role outside the grand jury. Another possible difference, noted above, is that, unlike the situation in Tennessee, the signature of the federal grand jury foreperson is not a prerequisite to a valid indictment. Nevertheless, Federal Rule 6(c) states that the foreperson's signature "shall" be on the indictment; thus, the act of signing is one function that may be only ministerial.[13]

The district court and the government also point out that in Tennessee the foreperson does not actually serve as a member of any grand jury, but instead is selected from the public at large and serves several grand juries. In the federal system, on the other

[13] Moreover, the federal grand jury foreperson's signature on an indictment gives the indictment a presumption of validity.

hand, the district judge selects a foreperson from the grand jury after it has been empanelled. But this difference is irrelevant insofar as it pertains to the significance of the foreperson's responsibilities in presiding over any given grand jury. Moreover, as long as the pool of potential forepersons contains qualified blacks and women, there should be no difference over the long run in the racial and sexual identity of those selected. In fact, if anything, the office of Tennessee foreperson arguably is less important than that of federal foreperson because the Tennessee foreperson, unlike the federal foreperson, is restricted to performing administrative functions. He does not participate in the grand jury voting process, see Rose v.Mitchell, 443 U.S. at 560, 989 S. Ct. at 3002, and thus probably does not have the potential for influence on the grand jury's deliberations that the federal foreperson

does.

To decide this appeal we need not speculate as to the possible effect of the alleged discrimination on Cross and other defendants in the Middle District of Georgia. It is enough for us that appellant has alleged discrimination in the selection process for a position on the grand jury which has significant responsibilities. Otherwise, if we were to decide that the foreperson position is insignificant, it would in our view be but a small step toward deciding in the next case that other compositional defects in the grand jury also are irrelevant. If the grand jury is to effectively fulfill its role as a check on prosecutorial abuse, the judicial system must jealously guard against attempts at undermining the grand jury's constitutional significance. For this reason, we disagree with the conclusion of the district court.